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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 United States of America,  
10 Plaintiff,  
11 v.  
12 David Allen Harbour,  
13 Defendant.  
14

No. CR-19-00898-001-PHX-DLR

**ORDER**

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16 Before the Court is Defendant's (Second) Rule 33(b)(1) Motion for a New Trial  
17 (Doc. 811) and Defendant's Motion for Reconsideration of Doc. 801 – Order re Forfeiture  
18 (Doc. 804).

19 The Court ordered the Government to file a response to the Motion for  
20 Reconsideration. The Government filed a "Consolidated Response to the Motion for  
21 Reconsideration and New Trial" (Doc. 824), but its consolidated response does not contain  
22 a substantive response to the motion for reconsideration. Although some of the issues in  
23 the motion for reconsideration and motion for new trial overlap, the Court will order the  
24 Government to file a substantive response to Defendant's Motion for Reconsideration of  
25 Doc. 801- Order re Forfeiture (Doc. 804)—in particular, the portions regarding manifest  
26 error and the forfeiture of community property—by no later than January 11, 2024.

27 Defendant seeks a new trial arguing, among other things, that a recent stipulation  
28 entered between Defendant and the IRS ("the IRS stipulation") and associated supporting

1 documents is newly discovered evidence which “goes to the heart of the Court’s ruling that  
2 [Defendant] committed wire fraud against Turasky and Burg.” (Doc. 811 at 5.)

3 The parties agree on the five-part test that a defendant must satisfy to obtain a new  
4 trial based on newly discovered evidence. The Court seeks additional information from the  
5 parties on three of the five elements; whether the evidence (1) is newly discovered and (2)  
6 material, and (3) whether a new trial would probably produce a different result. Because  
7 the Court is requiring legal citations and citations to the trial record, in lieu of oral  
8 argument, the parties shall file written responses to the following questions by no later than  
9 January 11, 2024.

## 10 **I. QUESTIONS DIRECTED TO DEFENDANT**

### 11 **A. Newly Discovered Evidence**

12 1. Defendant argues that the IRS stipulation, gross receipts, expenses, and tax  
13 returns, including Schedules C and E for the 2013 and 2014 tax years, are  
14 newly discovered evidence. Defendant concedes that he previously  
15 possessed the tax returns but argues that he could not use them as evidence  
16 at trial because (1) during an active audit there would have been a challenge  
17 as to whether the returns were authoritative (2) it would have given the  
18 prosecutor a second opportunity for cross examination and (3) offering them  
19 as evidence would have amounted to legal malpractice.

20 a. List every document that was not offered as evidence at trial but was  
21 provided to the IRS as proof of deductible business expenses during  
22 the relevant time frame.

23 b. List specifically every item that Defendant is claiming is newly  
24 discovered evidence.

25 c. Excluding the IRS stipulation, did any item identified above as newly  
26 discovered evidence not exist at the time of the trial?

27 d. Excluding the IRS stipulation, was any item identified above as newly  
28 discovered evidence not available to Defendant or his counsel at the

1 time of trial? If so, identify the item and explain its unavailability.

2 e. Provide legal authority for the argument that, although newly

3 discovered evidence, including the 2013 and 2014 tax returns,

4 Schedules C and E, and supporting documents existed at the time of

5 trial and were exculpatory, they nonetheless were unavailable for use

6 at trial because of the ongoing audit.

7 f. Provide legal and factual authority that offering Defendant's 2013 or

8 2014 tax returns, or any part of them, would have (1) amounted to

9 legal malpractice and (2) therefore it was appropriate to withhold

10 them as evidence.

11 g. Distinguishing the tax returns and schedules from the underlying

12 supporting documents supplied to the IRS, like receipts and bank

13 statements, why were the underlying supporting documents not

14 offered as evidence at trial. Provide legal authority for the claim that

15 documents the Defense knew existed at and before trial are newly

16 discovered evidence.

17 h. Wasn't the decision not to use the purported newly discovered

18 evidence merely trial strategy? If not, why not?

19 i. If Defendant is claiming that some of the purported newly discovered

20 evidence was not *physically* available at the time of trial,

21 i. Identify every such item;

22 ii. Identify the location of such item before and during trial; and

23 iii. State every act taken to locate and make such item available

24 before trial.

25 2. Other than Counsel's concern that the use of these items as evidence while

26 the tax returns were under audit would constitute malpractice, was there any

27 other reason the items identified above as newly discovered evidence were

28 not offered as evidence at trial?

1                   3. Defense expert Cathie Cameron testified about the extent and legitimacy of  
2                   Defendant's business expenses.

3                   a. Were the 2013 or 2014 tax returns, schedules, and supporting  
4                   documents relevant to her testimony?

5                   b. Was she provided the 2013 or 2014 tax returns, schedules, and  
6                   supporting documents? If not, why not?

7                   c. Is it the Defense's position that her testimony would have been more  
8                   effective had she been supplied with those documents? Explain any  
9                   response.

10                  d. Was there any other reason why the 2013 or 2014 tax returns,  
11                  schedules, and supporting documents were not provided to the  
12                  Defense expert? If so, provide legal authority that the additional  
13                  reason(s) warrant(s) a new trial.

14                  e. Before and/or at the time of trial, did Defendant or his legal team have  
15                  access to the QuickBooks containing invoices, bills, credit card  
16                  statements, cancelled checks, mileage records, wire transactions or  
17                  W-2's that contained evidence of the business expenses Defendant is  
18                  now arguing the IRS stipulation establishes?

19                  f. Do the QuickBooks contain explanations of Defendant's  
20                  expenditures?

21                   i. If not provided to Ms. Cameron, why not?

22                   ii. If not offered as evidence at trial, why not?

23                  **B. Materiality**

24                  1. Is it Defendant's contention that the IRS stipulation:

25                   a. Would be admissible at a new trial and, if so, under what authority?

26                   b. Would be binding on the Government and, if so, provide legal authority?

27                  2. What new information does the purported newly discovered evidence supply?

28                  3. For what entity(ies) or person(s) did Defendant spend Tursaky's and Burg's

1 money on alleged business expenses?

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3 4. Defendant was the owner of Oak Tree Management and Milagro Consulting but

4 was a consultant to Green Circle. If the purported newly discovered evidence

5 shows that Turasky's and Burg's money was spent by Defendant on his business

6 expenses, explain how that is relevant.

7 5. The jury could have found that not all Turasky's and Burg's money was

8 transferred to Green Circle. Is it Defendant's contention that even if \$400,000 of

9 the Burg investment and \$295,000 of the Turasky investment did not ultimately

10 reach Green Circle, the IRS stipulation establishes that Defendant engaged in no

11 cheating or deception? If so, explain.

12 **C. Different Result**

13 1. Defense expert Ms. Cameron stated her opinions on the nature of the

14 expenditures made by Defendant.

15 a. If she did not have the relevant tax returns and supporting documents,

16 what facts did she have to support her opinions?

17 b. How would her opinions have been any different if she had the purported

18 newly discovered evidence?

19 c. Aside from her opinions and the basis for those opinions, what fact

20 evidence was presented at trial that supports the contention that the

21 expenditures made by Defendant, which the Government contended were

22 improper personal expenditures, were in fact business expenses?

23 d. Would the purported newly discovered evidence likely change any of Ms.

24 Cameron's opinions or the Defense's arguments?

25 **II. QUESTIONS DIRECTED TO THE GOVERNMENT**

26 **A. Materiality**

27 1. In Doc. 796 at pages 8-9, the Government argues that Defendant could not have

28 had any business expenses to reimburse because he did not have any funds to

invest. Additionally, at the July 26, 2023, oral argument, the Government stated:

1        “I’ll tell you what would be a better exhibit: How about his tax returns from  
2        2014 and 2015? . . . That would show what his income [was] and his Schedule  
3        C with his expenses and overhead.” (Doc. 778 at 65.) Explain how those  
4        positions, which the Government has taken about the materiality of Defendant’s  
5        2014 revenue and his tax returns, are consistent with the Government’s  
6        contention that if the case was retried, the newly discovered evidence would not  
7        be material to any issue in the case?

- 8        2. Is the Government contending that evidence showing Defendant had legitimate  
9        business expenses is not relevant to any defense on any count for which  
10        Defendant was convicted? If so, explain.
- 11        3. Is the Government contending that if the case is retried, the IRS stipulation  
12        would be inadmissible? If so, explain.
- 13        4. The Government argues that Defendant’s 25% finder’s fee kickback morphed  
14        into the start-up of the Green Circle fraud scheme. What evidence was presented  
15        at trial that Defendant received a 25% finder’s fee for the moneys invested by  
16        Burg and Turasky?
- 17        5. The Government notes that the parties to the stipulation settled on  
18        \$5,021,729.00 in gross income and that the initial exam resulted in  
19        \$11,025,208.00 in gross income, representing the funds sent to Defendant from  
20        KSQ, but poses the question, “where did the money go?” Why does it matter  
21        how Defendant spent the money in excess of that spent on business expenses, if  
22        the business expenses equaled at least the amount invested by Turasky and Burg  
23        allegedly not moved to Green Circle (\$695,000)?
- 24        6. The Government argues that there is a mismatch between the newly discovered  
25        evidence and the result Defendant seeks. Please explain.
- 26        7. Does the Government contend that, in reaching its verdict, the jury did not  
27        determine whether Defendant’s expenditures were legitimate business  
28        expenses? If so, explain what other theory and evidence the jury could have

considered that would have supported the verdicts.

8. Does the Government contend that the jury's determinations in this case regarding the nature of all expenditures made by Defendant, i.e. whether they were personal or business expenses, were apparent from the facts and reasonable experts could not disagree?
9. The Government contends that the purported newly discovered evidence, including the IRS stipulation, is not material because it is not relevant to the misrepresentations and omissions Defendant made to Burg and Turasky. Please identify all misrepresentations and omissions that support the jury's verdict and for which the purported newly discovered evidence is not relevant, and as to each please explain why it is not relevant.

## B. Different Result

1. The Government's presentation of the evidence and arguments have been directed to the claims that Defendant squandered the investment moneys of Turasky and Burg on personal expenses instead of investments or business expenses. If the jury finds that the IRS stipulation shows more money was spent by Defendant on legitimate business expenses than allegedly failed to reach Green Circle, could there still be a finding of guilt as to the wire fraud charges stemming from the Turasky and Burg investments? If so, please explain how factually and legally that could occur.
2. Is it the Government's contention that, even if the jury believes the purported newly discovered evidence shows that Defendant spent the Turasky and Burg investment money for what the IRS has stipulated to be deductible expenses, the outcome of a new trial would not likely be different because the jury would likely find:
  - a. Green Circle was a fraud or Ponzi scheme?
  - b. KSQ was a fraud or Ponzi scheme?
  - c. Oak Tree Management was a fraud or Ponzi scheme?

d. Milagro Consulting was a fraud or Ponzi scheme?

3. For each of the above entities that the Government contends was a fraud or Ponzi scheme, state the factual basis for the contention.

**IT IS ORDERED** that, by no later than January 11, 2024:

1. The parties shall file written responses to questions posed in this order.

2. The Government shall file a substantive response to Defendant's motion for reconsideration.

**IT IS FURTHER ORDERED** that Sentencing in this matter is continued to

Tuesday, January 30, 2024, at 9:30 a.m.

Dated this 5th day of January, 2024.

  
Douglas L. Rayes  
United States District Judge